

January 5, 2022

David Bordelon¹⁹¹²
Louisiana Board of Governmental Ethics
P.O. Box 4368
Baton Rouge, LA 70821

Re: Request for Advisory Opinion – Service as a Commissioner on the Capital
Area Ground Water Conservation District

Dear David:

Baton Rouge Water Works Company (“BRWW”), through undersigned counsel, respectfully requests an Advisory Opinion regarding the application of the Louisiana Code of Governmental Ethics (the “Ethics Code”) based upon the following facts:

I. Background Facts

A. History and Background of the Capital Area Ground Water Conservation District

In order to evaluate the issues presented, a full outline of the history of CAGWC is essential. BRWW, as the supplier of drinking water to the citizens of Baton Rouge, perhaps has the greatest interest in insuring that an abundant supply of fresh drinking water, not adversely impacted by saltwater, is protected and maintained. The origins of the CAGWCC can be traced back as early as the 1930s, when concerns arose on the part of BRWW that the water levels in the aquifers underneath Baton Rouge were potentially dropping. In an attempt to address the issue, the Louisiana Legislature established a Louisiana Water Resources Study Commission around 1936, but the group met only a few times and did not take much action.

In 1946, a water commission was proposed to Baton Rouge Mayor Woodrow “Woody” Dumas by a group of concerned individuals. This group was led by Leo Bankston, who was the Production Manager for BRWW. As a result, East Baton Rouge Parish Resolution 53:24 was passed which established a special Water Conservation Commission to study groundwater conditions, with particular focus on saltwater encroachment, and to make recommendations for remedial action.

In 1965, the Louisiana Water Resources Research Institute proposed a study of possible solutions to the threat of saltwater encroachment. Five years later, in 1970, a legislative act (No. 682) established the Greater Baton Rouge Water Conservation District (La. R.S. § 38:3051) and a twenty-member Board of Commissioners was appointed to administer District affairs. Leo Bankston led the efforts that resulted in this legislation. This Commission gathered enough information to determine there was a need for further legislation. Proposed legislation was presented to the Louisiana Legislature, but initially failed to pass.

In 1974, a bill was introduced that expanded the District to include the five parishes in the capital area (East Baton Rouge, West Baton Rouge, East Feliciana, West Feliciana, and Pointe Coupee). Recently, Ascension Parish was added to the District. The bill passed (Act No. 678), creating what is currently known as the Capital Area Ground Water Conservation District (La. R.S. § 38:3071) and a Board of Commissioners to administer the affairs of the District. The first organizational meeting of the CAGWCC was held on January 14, 1975. Among the first group of commissioners was Leo Bankston, who served as the first chairman of CAGWCC for several years. Again, the party who took the lead in pushing this legislation was BRWW and in particular, Mr. Leo Bankston. It is worth noting that Mr. Bankston's efforts were recognized by the CAGWCC through the creation of the annual Leo Bankston Groundwater Conservation award.

The current Ethics Code, La. R.S. 42:1101 *et seq.*, was not enacted until five years later in 1979.

Since its creation, CAGWCC's purpose has been to provide for the efficient administration, conservation, orderly development, and supplementation of groundwater resources for the capital area. La. R.S. § 38:3071. The CAGWCC has driven investigative efforts and policy changes and fostered an atmosphere of cooperation to promote the responsible development and conservation of the groundwater resources in the area and to protect the quality of these resources. Numerous actions have been taken by the CAGWCC to study, assess, and address the matters of subsidence, saltwater encroachment, and water level decline. The efforts of CAGWCC (including basic data collection and scientific investigations and discussions), have led to policy changes designed to protect the groundwater resources in the Baton Rouge area, and have been and are used by major water users, planners, and managers to develop withdrawal plans to help protect the area's groundwater resources.

The Board of Commissioners for the Capital Area Groundwater Conservation District administers the affairs of the district. La. R.S. § 38:3072(B). The CAGWCC currently consists of eighteen (18) board members, including: *Three (3) members representing privately or publicly owned entities that furnish water for rural or municipal use within the district with the condition that at least one of said three members shall always be from the nominees of privately owned users furnishing a municipal water supply.* See La. R.S. § 38:3074. [Emphasis added]. The last clause was clearly intended to insure BRWW, as the primary supplier of drinking water in the District, had representation on the CAGWCC.

B. BRWW's Leadership in the CAGWCC

Water for Baton Rouge is obtained and provided to the greater Baton Rouge area by BRWW from over sixty wells ranging in depth from 600 to 2,800 feet. BRWW draws groundwater through its wells, emerging from the ground bacteriologically pure. BRWW then chlorinates and pumps the water to distribution lines amassing over 1,550 miles in length. BRWW assures the water's safety for human consumption and delivers it to the Baton Rouge area on a continuous basis. BRWW's water supply is regulated by the Louisiana Office of Conservation (specifically the Commissioner of Conservation), and the Louisiana Department of Health and Hospitals ("DHH"). Its operations, and in particular the rates it charges its customers is regulated by the

Louisiana Public Service Commission (“LPSC”). BRWW is also subject to various regulations of the Louisiana Department of Environmental Quality (“DEQ”).

When CAGWCC was created, it was intended to serve as a cooperative entity to bring industry leaders and knowledgeable representatives together for the purpose of preserving the capital area’s groundwater resources. As such, CAGWCC Board Members who are appointed to represent municipal and industrial users are often employed by businesses engaged in the use and/or processing of groundwater, such as BRWW. Indeed, BRWW was instrumental in the establishment of the Capital Area Groundwater Conservation District and continues to play a fundamental role in the conservation of groundwater by serving on the CAGWCC Board and providing resources and data in furtherance of CAGWCC’s mission.

Not surprisingly, as the primary supplier of drinking water in the District, BRWW employs individuals who possess some of the most knowledge about groundwater. Most recently, Ryan Scardina and Dennis McGehee (BRWW’s current production manager, the same position held by Mr. Bankston) served on the CAGWCC Board as representatives of municipal users. The following former BRWW employees have served as CAGWCC Board Members:

- Leo Bankston – Chairman (1975) - Mr. Bankston was employed by the Baton Rouge Water Company for more than 46 years, retiring as Vice President and Superintendent in 1983. Mr. Bankston was instrumental in the formation of the Capital Area Ground Water Conservation District and served as the Commission’s first Chairman in 1975. CAGWCC named a Chairman’s award after him, which BRWW received in 2016.
- Dennis McGehee – Chairman (2014), Treasurer (2013), Administrative Committee Chairman (2013), Technical Committee Chairman (2011, 2012), Board Member (2010, 2011, 2012, 2018, 2019)
- Ryan Scardina – Board Member (2018, 2019)
- Melvin “Trey” Argrave, III – Board Member (2011, 2012, 2015, 2016)
- BRWW executives, Ken Naquin, Roland Jackson, and Patrick Kerr, have also served as commissioners over the years.

In addition to BRWW employees serving as commissioners of the CAGWCC, BRWW has contributed to various CAGWCC initiatives. For instance, as part of a complex groundwater conservation initiative developed through the cooperation of the CAGWCC, the U.S. Geological Survey, and DOTD, BRWW drilled and completed, at its cost, a scavenger well that discharges non-potable groundwater to the Mississippi River, thereby lowering the salinity level in the 2,000 foot aquifer. The plan is designed to retard the migration of more saline groundwater south of the Baton Rouge fault into the less saline groundwater to the north, which is currently used to supply Baton Rouge’s residents with drinking water. The plan to install the scavenger well was the result of a study jointly funded by BRWW and CAGWCC. To date, the scavenger well has worked better than was forecast.

Critical to this inquiry, BRWW does *not* contract with CAGWCC. The only financial connection that BRWW has to CAGWCC is the quarterly pumpage fee that BRWC pays to CAGWCC. This fee is in the same amount that all other users pay. Importantly, other than for water for its own company use, this fee is not “paid” by BRWW; it is billed to and collected from BRWW’s customers (pursuant to approval from the LPSC) who pay the fee. In other words, BRWW merely collects the fee from the end-user of the water and passes it along to the CAGWCC.

II. Request for Advisory Opinion

Can employees of BRWW serve of the Board of Commissioners of the CAGWCC without violating the provisions of the Ethics Code when the enabling statute creating the CAGWCC predates the Ethics Code and specifically requires that the Commission include three members that represent municipal users?

III. Proposed Advisory Opinion

CAGWCC’s enabling legislation is found at La. R.S. 38:3071 *et seq.* The Board of Commissioners of the CAGWCC has eighteen members, three (3) of whom represent privately or publicly owned entities that furnish water for rural or municipal use within the district with the condition that at least one of said three members shall always be from the nominees of privately owned users furnishing a municipal water supply. Other than a very few minor private systems (i.e. serving trailer parks), BRWW is the only privately owned supplier of municipal drinking water in the District.

The legislature specifically provided that three members were to be nominated by suppliers of rural and municipal water and one member must be nominated from privately owned municipal water suppliers. This eighteen-member commission ensures that all groundwater users – and especially BRWW as the primary municipal water supplier – have a position on the commission and have a voice on those issues that may have an impact on all ground water users equally. As discussed, BRWW employees have specific knowledge and expertise that is invaluable to the Board and to the public.

The Court of Appeal, Fourth Circuit, has held that the Ethics Board does not have the power to change an act passed by the legislature and, thus, may not change the qualifications of the members of a state board. In *Louisiana Milk Commission v. Louisiana Comm’n on Governmental Ethics*, 298 So. 2d 285 (La. App. 4 Cir. 1974), the Fourth Circuit held that the Commission on Governmental Ethics [the predecessor to the current Ethics Board] “acted *ultra vires*” in determining that members of the Milk Commission who were producers, handlers, retailers or otherwise engage in the dairy industry, albeit statutorily qualified, were in violation of the Ethics Code and were required to either resign or divest themselves of any economic interest in the dairy industry. Moreover, the Fourth Circuit found that there was an “**irreconcilable conflict**” between legislative expressions.” at p. 289. [Emphasis added].

Additionally, in *Hill v. Commission on Ethics for Public Employees*, 453 So.2d 558, (La. 1984), the Louisiana Supreme Court analyzed whether a person who is a licensed cosmetologist or shop owner could serve on the Board of Cosmetology. In that case, the Supreme Court found

that the statute in requiring that a board member “‘shall have been’ actively engaged or at least five years prior to their appointment as a cosmetologist or teacher” implied that practitioners were to serve on the board. *Id.* at 562. Additionally, the court cited with approval Judge Sartain’s concurrence in the *Milk Commission* case:

‘It is my belief that the principal reason why the Legislature decreed that three members of the Commission are required to be milk processors and one member a milk producer is that the Legislature deemed that these appointees would be possessed of certain expertise in the handling and production of milk. This does not, per se, create a conflict of interest.’

Id. (quoting, *Louisiana Milk Commission v. Louisiana Commission on Governmental Ethics*, 298 So.2d 285, 291 (La. App. 4 Cir.1974)). Similarly, BRWW employees are “...possessed of certain expertise in the [production of groundwater]. This does not, per se, create a conflict of interest.”

The issue here is the same as that presented in *Milk Commission*, the Legislature has designed the composition of the Board of Commissioners of the CAGWCC to ensure that municipal water suppliers and their interests are represented. And, as the Court concluded in *Milk Commission*, the Ethics Board does not have the authority to interpret its provisions in a manner that prohibits municipal water suppliers from having their representatives serve on the Board of Commissioners of the CAGWCC. As the Supreme Court acknowledged in *Hill*, the rationale behind these structures is to have expertise represented on the Board. In both instances, the Boards predate the Ethics Code, and their purpose would be frustrated by applying the Ethics Code in such a narrow manner that employees of appointers, who possess the expertise necessary to assist the Board, would be barred from service.

Additionally, while La. R.S. 42:1111C(2)(d) prohibits an appointed member of a board or commission from receiving any thing of economic value from a person which has a contractual, business or financial relationship with the board on which the member serves or from any person whose activities are regulated by the CAGWCC, this does not give rise to a violation of the Ethics Code by employees of BRWW.

CAGWCC’s enabling legislation is found at La. R.S. 38:3071 *et seq.* Section 3076 outlines the Powers of the Board and provides:

A (14) To assess against **all users** within the district a charge based upon the annual rate of use of each user sufficient to meet costs and expenses of operation.

The only existing “relationship” or “regulatory” activity between municipal users and the CAGWCC is that of an entity doing what it, and any other user, is statutorily-required to do – pay assessed charges. Thus, municipal users have the same relationship with the CAGWCC as any other “user” in the six parish area that is required to pay, either directly or indirectly through a public or private water company, for the water the “user” consumes each month. Here, however, the pumpage fee is paid by the end-user of the water – BRWW’s customers.

In *Louisiana Bd. of Ethics v. Randolph*, 2013-1509 (La. App. 1 Cir. 8/21/14), writ denied, 2014-1987 (La. 11/21/14), 160 So. 3d 974. The Court of Appeal, First Circuit concluded that no contractual, business, or financial relationship as contemplated by La. R.S. 42:1111(C)(2)(d) and 42:1115(A)(1) existed between BP and Terrebonne Parish because the Agreement "imposed no obligations or duties upon the Parish other than those imposed upon it irrespective of the Agreement." Payment of assessed charges for the use of groundwater and the lack of reciprocal obligations by the CAGWCC does not rise to the level of a contractual, business or financial relationship as contemplated by La. R.S. 42:1111C(2)(d) between municipal suppliers and the CAGWCC.

Municipal users are not prohibited sources of income to members of The Board of Commissioners of the CAGWCC, and their employees' service on the Board of Commissioners is not otherwise prohibited by the Ethics Code.

It is also important to note that many other boards have representatives of businesses who are regulated by the respective board serving in a similar capacity, including, but not limited to, the Board of Louisiana River Pilot Review and Oversight, the Graeter Baton Rouge Port Commission, the State Board of Cosmetology, the St. Tammany Parish Development District, the Port of South Louisiana Commission, the Board of Commissioners of the Port of New Orleans, the Louisiana Motor Vehicle Commission and the State Board of Dentistry. In each instance, there is statutory requirement that should the board or commission have before it for consideration a matter that would affect the business of the board member, that board member should simply recuse himself or herself. Here, particularly because enabling legislation was passed before passage of the current version of the Ethics Code, it is submitted that an opinion requiring recusal would be the most appropriate result.

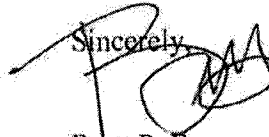
Finally, the very purpose of CAGWCC is to drive investigative efforts and foster cooperation in order to protect the capital area's groundwater resources. The presence of BRWW employees on the CAGWCC Board was not only contemplated when CAGWCC was statutorily established, but continues to further CAGWCC's purpose. The purpose of CAGWCC is not to govern BRWW or other similar businesses engaged in the use of groundwater, but rather serve as a means to bring government agencies, groundwater users, and conservationists together in order to facilitate plans and recommend procedures to the Office of Conservation related to the shared goal of preserving the capital area's groundwater supply. The CAGWCC Board is comprised of various members who represent different groups interested in the use and conservation of groundwater. Only a small percentage of the CAGWCC Board members represent municipal suppliers, such as BRWW. The other Board Members represent government regulatory agencies, conservationists, and constituents from each of the parishes in the district.

BRWW and its employees have been a vital asset to the CAGWCC since its inception. BRWW and its employees specialize in waterworks and processing groundwater. The enabling legislation created a seat for BRWW employees serve on the CAGWCC Board because they are qualified and knowledgeable about groundwater. Moreover, as employees of BRWW, the area's sole water provider to the public, these members are able to provide unique expertise and perspective as well as up to date information to CAGWCC that others cannot. Indeed, to conclude

that BRWW employees cannot serve on the CAGWCC would be a tremendous disservice on the citizens who drink the water produced by BRWW will be the result.

IV. Conclusion

Based on the foregoing, we request that the Ethics Board issue an advisory opinion at its January 6, 2022 meeting concluding that employees of BRWW are not prohibited under the Ethics Code from serving on the Board of Commissioners of the CAGWCC when the enabling statute creating the CAGWCC specifically requires that the Commission include three members that represent water suppliers and at least one member of a privately owned water supplier.

Sincerely,

Brett P. Furr